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No. 98-2006

In The

Supreme Court of the United States

**PASTOR MICHAEL CLOER;
PASTORS FOR LIFE, INC.,**

Petitioners,

v.

**THE GYNECOLOGY CLINIC, INC., d/b/a
PALMETTO STATE MEDICAL CENTER,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA
SUPREME COURT**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introductory Facts

Gynecologic Clinic, Inc., which is known as "Palmetto State Medical Center" (Palmetto State) is a medical facility, which performs OB/GYN, services, as well as clinical abortions. It is undisputed that it is located on an extremely busy street—Laurens Road in Greenville. Appellants object to the provision of abortion and engage in activities to stop the provision of abortion.

In their Petition for Writ of Certiorari, Petitioners asserted that the South Carolina Courts lightly imposed injunctive relief to stop the "lawful conduct" of protesters holding picket signs and crowding the clinic driveway. They recklessly assert that the South Carolina Supreme Court did not examine the basis for imposing the injunction (App. Brief p. 21). However, the facts are different than presented by Petitioner—so much so that the South Carolina Supreme Court unanimously affirmed the injunction.

Appellant Cloer is a pastor in Greenville who is a leader of "Pastors for Life". He has admitted to trespassing on the clinic property in the past—and even blockading the doors (R. p. 234, Lines 13-24). Cloer admitted that his goal was to close down the clinic (R. p. 235, lines 4-6). He has admitted to using a bullhorn to preach and lead crowds outside the clinic (R. p. 232, lines 1-3) and that the bullhorn can emit excessive noise (R. p. 234, lines 9-12). Cloer admits that the road in front of the clinic is "dangerous" (R. p. 230, line 18).

Cloer is currently the "National Director" for co-Appellant, Pastors for Life, and was their former "Local Director" (R. p. 226, line 9-12). Pastors for Life is the owner of property next door to the clinic. While Cloer, as "Director" for Pastors for Life, acknowledged a duty to mitigate safety hazards (R. p. 230, lines 11-15) and acknowledged that the organization could set rules for

people to protest the clinic (R. p. 230, lines 2-10), it has no such rules or safeguards (R. p. 230 lines 18-20). Cloer admits to being "on notice" of severe ingress/egress problems at the clinic, due to the protesters blocking vision, for approximately three years (R. p. 233, lines 2-8).

It is undisputed that Pastors for Life owns the lot next door to the clinic and has allowed the lot to be used as a "base" for anti-abortion activities. Cloer stated it was his "intent that by providing a base where protesters and counselors could operate you could slowly effect the status of the clinic" (R. p. 236, lines 21-24). Cloer has been arrested 5 or 6 times regarding protesting abortion, including being arrested for blockading the clinic in 1989. Two other members of Pastors for Life's Board have also been arrested for blockading the doors of Greenville abortion providers (R. p. 240, lines 6-15). Cloer admits that he, on behalf of Pastors for Life, has a calendar and coordinates which protesters show up (R. p. 241, lines 13-18). When co-Defendant (in the State Circuit case) Ruth Trippi and another protester were jailed by the Honorable Larry Patterson for willfully violating the temporary injunction in this case, Cloer hailed them as "heroes" . Much testimony presented at all the hearings concerned an individual named Richard Cash. Cash is employed by Pastors for Life, by Cloer's recommendation (R. p. 226, lines 23-24). He has participated in approximately 20 "rescues", including the prior one at Palmetto State (R. p. 214, lines 7-23). He admits to helping "organize and lead" the 1992 "rescue" at Palmetto State (R. p. 215, lines 6-20). Cash readily acknowledges that his goal is to stop abortion, which includes blockading doors (R. p. 217, lines 11-12). Cash is at the clinic basically from its opening hour to its close (R. p. 218, lines 14-17). Cash has been arrested fifteen or twenty times—so many, he cannot remember the number of his arrests (R. p. 224, lines 13-15, R. p. 225, line 7). All were for abortion activity.

Facts regarding impeding ingress/egress of traffic

At the September 7, 1994 hearing, Officer Jefferson of the Greenville City Police Department testified regarding driving his car through the clinic driveway (which shares a driveway with Pastors for Life's property). The Officer testified that he observed drivers going out of the clinic were unable to see the traffic flow they were entering, due to protesters and their signs obstructing the view. In fact, the Officer testified that he could not see more than five steps from his car due to visual obstruction by the protesters. Richard Metcalf, a former security guard for the clinic, testified that he observed Cash and other protesters standing in front of vehicles—where the drivers were unable to see either way when trying to enter the flow of traffic. He further testified that they put their signs and arms in front of the windshields of cars leaving the clinic. Similarly, Elizabeth O'Conner testified that, when exiting the clinic, she could not see the flow of traffic due to the protesters on both sides of the driveway. (R. p. 272-275 R. p. 281-282, and R. p. 285-294). Even a former patient testified that after her operation, when she tried to exit the clinic driveway onto Laurens Road, she could not see oncoming traffic—because Richard Cash (of Pastors for Life) and another protester were holding big signs blocking her vision (R. p. 243-246). She testified that her mother (the actual driver) had to "blindly" pull out and just hope an accident did not result (R. p. 245, lines 22-24).

According to the security guard for the clinic, "There's usually protesters on both sides of the driveway. Depending on, well, the layout of this property itself, either way it's an impairment to vision" (R. p. 169, lines 13-16).

It is undisputed that there are safety concerns due to the flow of traffic on this busy street and the Petitioners do not even challenge the factual findings regarding the substantial blockage of vision and egress/ingress. Instead,

they seem to feel they have a constitutional right to put others in danger.

Facts regarding Excessive Noise and Noise Amplification

At the September 7, 1994 hearing, Ricki Riddle, former Manager of Palmetto State, testified that while inside the clinic she could hear loud chanting and preaching—which was clearly audible (R. p. 082-083). Ricki also heard bullhorns used outside and had to turn up the radio inside to drown the noise created from the protesters. Richard Metcalf testified that he had personally seen Trippi and Cash yelling into the window area in front of the clinic. His pleas to stop the noise were ignored. Metcalf has seen Trippi with the bullhorn (R. p. 089). Richard Fuller and Elizabeth O'Connor (R. p. 121) testified to seeing Appellant Cloer with the bullhorn (R. p. 099). Kern testified to seeing Cloer with the bullhorn to engage the protesters in loud chanting and singing (R. p. 103-105).

Facts Regarding Harassment and Threats

At the September 7, 1994 hearing, Richard Metcalf testified that Trippi told him "we have assault rifles and it's perfectly legal to have them" (R. p. 091-092). Kern testified that, following the well-publicized shooting of a doctor from a clinic in Pensacola, Florida, by a protester, Trippi was standing on the building owned by Pastor's for Life and yelled at her "you're next" (R. p. 112). She also testified to being threatened by Cash (R. p. 117). Curtis Hinkle (a volunteer escort) testified that two protesters cornered him with his back against the wall the clinic. Because he did not want to provoke an altercation, he stayed pinned there—subjected to continuous lecturing and readings from the protesters (R. p. 126). Neal McFarland testified to co-Defendants Trippi and Walsh—with Cash (employee of

Pastors for Life)—harassing patients coming on to the facility in a manner which could only be construed as abusive and harassing (R. p. 407-C) and of co-Defendant Trippi striking an escort with a protest sign (R. p. 412).

McFarland testified to hearing Cash approach Kim Chamness, an employee and say "What's the matter, are you afraid you'll get shot?" (R. p. 179, lines 21-22).

This is not only an emotional situation, but also a potentially dangerous one. The clinic only requested reasonable safeguards for its employees and patients.

The Injunctive Relief Granted

The terms of the injunction were narrowly drawn to simply address the evidence presented and the finding of civil conspiracy. The Petitioners now cannot trespass on the clinic property and stand in the clinic driveway (which they have no colorable right to do anyway). They were also ordered to stay 12' from the driveway, which the Court concluded from the evidence presented would be the minimal distance to ensure that drivers could see oncoming traffic to exit the clinic and cars could safely pull in from Laurens road. The Petitioners also now cannot use their bullhorns, loudspeakers or by screaming which can be heard inside the clinic by someone of ordinary hearing.

ARGUMENT

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED. THERE IS NO CONFLICT WITH PRECEDENT FROM THIS COURT OR APPLICABLE CONFLICTS WITH OTHER STATE HIGH COURTS.

There is no conflict with the Texas Supreme Court

The Petitioners assert that the case *sub judice* is in direct conflict with the Supreme Court of Texas in Valenquela v. Aquino, 853 S.W. 2d 512 (Tex. 1993). In Valenquela, Dr. Aquino obtained a jury verdict against protesters picketing his residence on the sole theory of negligent infliction of emotional distress. The Court also awarded damages and imposed a 400' buffer zone around Aquino's home. However, since Texas has never recognized the theory negligent infliction of emotional distress, the case was reversed.

However, Aquino also sued for invasion of privacy—and the Court's opinion is not clear whether this theory was simply not charged or whether it was dismissed. The Texas Supreme Court remanded the case back to trial on the privacy issue. The Court made no ruling about the effect, if any, law protecting privacy interests would have on concurrent law protecting civil rights. Indeed, they stated "Absent findings or evidence to establish Valenquela's liability to Aquino, we decline to debate the very important and difficult but nevertheless hypothetical issue of whether Valenzuela's constitutional rights might provide a shield from such liability if it were ever established" Aquino at 853 S.W.2d 513.

It is puzzling why the Petitioners believe that South Carolina's law on civil conspiracy has anything to do with

Texas' decision not to recognize negligent infliction of emotional distress—in any circumstance—as a viable legal theory. Any "conflict" the Aquino case has with the one *sub judice* is far-fetched at best.

SOUTH CAROLINA'S RULING IS CONSISTENT WITH THE PRECEDENT ESTABLISHED BY THIS COURT.

Petitioners also assert that South Carolina trampled on five cases earlier decided by this Court. Petitioners seem not to notice that South Carolina used these very cases in making its ruling and tailored the injunctive relief specifically by the guidelines established by this Court.

The United State Supreme Court's decision in Madsen v. Women's Health Center, 512 U.S. 1277, 114 S.Ct. 2516, reh'g denied, 115 S.Ct. 23 (1994), provides the proper standard for evaluating whether an injunction regulating activity around a reproductive health center facility violates the First Amendment to the United States Constitution. In that case, the Court upheld provisions of an injunction establishing a 36-foot buffer zone around the entrances and driveway of a reproductive health care clinic and imposing certain noise restrictions around the clinic. The Court held that an injunction passes Constitutional muster even if its has the effect of limiting expressive activity in and around a medical facility if it is (1) content neutral, id. at 2523; (2) serves a significant government interest, id.; and (3) burdens no more speech than necessary to protect that interest, id. See also Pro-Choice Network v. Schenck, 67 F.3d 377, 386 (2nd Cir. 1995) in banc, cert. granted, 116 S.Ct. 1260 (1996)(applying Madsen analysis to uphold injunction creating fifteen-foot buffer zone around clinic entrances and fifteen-foot bubble zones around individuals and cars approaching and leaving clinics); Planned Parenthood Shasta Diablo, Inc. v. Williams, 898 P.2d 402, 402 (Cal. 1995, pet. for cert. filed, Oct. 10, 1995 (applying Madsen to

uphold 60-foot buffer zone). As the California Supreme Court stated, "Madsen conclusively affirmed the principle which many lower courts – including our own – had previously endorsed, that a narrowly drawn 'buffer zone' around a family planning clinic may be justified if it advances significant state interests." Williams, 898 P.2d at 409. Madsen is quoted and applied throughout the Orders issued by both the Trial Judge and the South Carolina Supreme Court.

The Court's Order is Content-Neutral.

The Court's Order of July 15, 1997 is clearly content-neutral. It singles out no specific message. It only regulates the conduct of defendants, and makes no reference to the content of their speech. Courts have consistently found injunctions that govern the conduct of individuals around reproductive health care facilities to be content-neutral. See e.g., Madsen, 114 S.Ct. at 2423-24; Williams, 898 P.2d at 408-09, Pro-Choice Network, 67 F.3d at 386.

The Petitioners do not assert that the Trial Court order, affirmed by the SC Supreme Court, was not content neutral. Instead, they present the court with a fire-and-brimstone collage of first amendment standard quotes that just accuse South Carolina of a "large-scale amputation of First Amendment Jurisprudence" and of ignoring Madsen—even though Madsen is the basis underlying every Court order in this case.

1. The Court's Order Serves Significant Government Interests

The existing injunction and a permanent injunction serve significant governmental interests. Courts consistently have recognized a number of significant government interests that may validly support an injunction limiting or regulating activity in the immediate vicinity of a clinic.

These include: protecting a woman's freedom to seek lawful medical services, ensuring public safety and order, promoting the free flow of traffic, protecting property rights, safeguarding medical privacy, and protecting the health and safety of medical patients. Madsen, 114 S.Ct. at 2526; Williams, 898 P.2d 409-11; Pro-Choice Network, 67 F.3d at 387.

The injunction issued by Judge Pleicones clearly serves a number of these interests, including ensuring safe access to reproductive health services, traffic safety, medical privacy, protecting property rights and maintaining public safety and order. The Court's Order restricts activity around cars entering and leaving the clinic, prohibits blocking ingress and egress to the building and parking lot, prohibits trespassing on the driveway and in the parking lot, prohibits approaches to physicians, and bans excessive noise. The buffer zone and restrictions on blocking access and trespassing ensures that patients can freely enter and leave the clinic, ensuring access to medical services, medical privacy, and protecting property rights and the public safety and order. The restrictions on approaching cars in an other than peaceful manner, on blocking the view of traffic and other prohibitions on interfering with ingress and egress protect traffic safety. The restrictions on approaches to physicians ensures that needed medical personnel can safely and easily enter and leave the clinic, promoting access to medical services and protecting medical privacy. There can be no question that these governmental interests are substantial.

2. The Court's Order Burdens No More Speech Than Necessary in Protecting Those Interests.

The third requirement of Madsen is also satisfied here. While the First Amendment does protect peaceful picketing, leafletting, and other forms of expression, it does

not permit individuals to obstruct public streets or building entrances "and allow[s] no one to pass who did not agree to or listen to their exhortations." Cox v. Louisiana, 379 U.S. 536, 555 (1965)(upholding state law prohibiting the obstruction of public streets and sidewalks); see also Cameron v. Johnson, 390 U.S. 611, 616-17 (1968)(upholding statute banning picketing that obstructs or interferes with access to a courthouse. Nor does the First Amendment prevent government from acting to punish "coercive or obstructionist conduct," independent of the obstructor's message. Pro-Choice Network, 67 F.3d at 395 (Winter, J. concurring); see also United States v. O'Brien, 391 U.S. 367, 382 (1968)(upholding regulations forbidding draft card burning.

The 12-foot buffer zone on either side of the driveway established by Judge Pleicones clearly meets the standard of burdening no more speech than necessary. Where conduct that may include expressive activity interferes with access to a reproductive health care facility, courts have overwhelmingly permitted a buffer zone of limited size that preserves safety, privacy, access to medical care and other significant interests while permitting other avenues of communication. See, e.g., Madsen, 114 S.Ct. at 2527 (upholding a 36-foot buffer zone on public right-of-way around clinic); Williams, 898 P.2d at 412 (60-foot buffer zone); Pro-Choice Network, 67 F.3d at 389 (15-foot buffer zone); Feminist Women's Health Center v. Blythe, 39 Cal. Rptr. 2d 189, 199 (Cal. App. 3 Dist. 1995), cert. denied, 116 S.Ct. 514 (1995)(upholding buffer zone); Horizon Health Center v. Felicissimo, 659 A.2d 1387, 1390 (N.J. App.) cert. denied, 667 A.2d 191 (N.J. 1995)(upholding 36-foot buffer zone); Fischer v. City of St. Paul, 894 F. Supp. 1318, 1329 (D. Minn. 1995) (upholding police action erecting fence around clinic to create a 20-foot buffer zone). As set forth above, the injunction upheld in Madsen was a 36-foot buffer zone. Even though the conduct of the appellants in this case and the physical characteristics of the

location create an even more compelling case than those in Madsen, the injunction issued by Judge Pleicones is only one-third on the site already approved by the Supreme Court and smaller than those upheld in the other decisions cited above.

Efforts by the appellants to block access to the clinic, including standing in the driveway, attempting to impede cars entering and leaving the clinic, stopping individuals seeking to enter or leave the clinic, creating a threatening climate of harassment and intimidation by yelling at patients and staff, and other behaviors justify a buffer zone of the limited size proposed in this case. Indeed, this twelve-foot zone is smaller in size than many that courts have upheld. It permits free access, while allowing appellants other avenues of communication. They may stand on the property of the adjacent Women's Center, stand anywhere outside the 12-foot buffer zone, show signs clearly visible within the zone, and approach individuals outside the zone.

The aspects of the Court's Order governing traffic safety include preventing defendants from stopping or otherwise interfering with the free flow of traffic entering or leaving the clinic, from blocking the view of oncoming street traffic for vehicles exiting the clinic, and from approaching any vehicle in an other than peaceful manner. Courts have upheld buffer zones that prohibit individuals form occupying driveways or even streets around clinics to prevent obstruction of vehicle traffic or other traffic safety problems. In Madsen, the 36-foot buffer zone placed protesters all the way across the street and on the opposite sidewalk from the clinic, in part to permit the orderly flow of car traffic. 114 S.Ct. at 2526-27; see also Williams, 898 P.2d at 404-05. In much the same way, the more limited restrictions on the appellants' actual conduct at issue here burden no more speech than necessary to protect traffic safety and permit the free flow of vehicles in and out of the clinic driveway. The appellants' repeated conduct of blocking the driveway and stopping cars justifies this aspect of the injunction. The

appellants are not prohibited from expressing their message, merely form expressing it in a way that blocks traffic or endangers drivers around the clinic area.

The record and even a cursory examination of the location reveals that Judge Pleicones' injunction or even a similar or more severe injunction will give defendants ample opportunities to express their views. Appellant organization owns the property immediately next door to the clinic. Appellants admit welcoming and encouraging all protesters of the clinic. Thus, even if appellants are, for the reasons described above, restricted in their activities on the sidewalks immediately adjacent to the clinic, they can use their own property to engage in lawful protest. Given its proximity to the clinic, anyone who drives by, in or out of the clinic will necessarily see such protest activities. Moreover, if appellants chose to protest along the property line between the properties in ways that are lawful, proper (i.e., not prohibited by Judge Pleicones' Order), they have alternative opportunities for expression. Finally, appellants have the use of the public sidewalks relatively near the clinic's driveway, so long as it is sufficiently restricted to ensure that traffic on Laurens Road is visible to those coming in and out of the clinic. Therefore, this constitutes yet another options for defendants to use in lawfully expressing their view. In short, the existing restrictions or even more severe restrictions will not burden the rights of appellants more that is necessary to serve the government's interests.

Courts have approved limited noise restrictions around health care facilities, where restrictions are reasonable in light of the nature of the facility being protected. Madsen, 114 S.Ct. at 2528; see also NLRB v. Baptist Hospital, 442 U.S. 773, 782-84 (1979)(upholding hospital anti-solicitation rule in patient areas because of effect on health and well-being of patients); Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989)(upholding ordinance banning use of a hand-held amplifier within 150 feet of a medical facility); see also Grayned v. City of Rockford, 408

U.S. 104, 116 (1972)(upholding local ordinance regulating noise levels around schools).

The evidence in the record shows repeated loud and intrusive noisemaking, including the use of bullhorns (R. p. 082-083, 089, 092, 099, 103-107, 121, 126, 133, and 143-144), shouting and yelling (R. p. 407-B, 407-C) and other forms of disturbing noise, and evidence that the noise disturbs patients seeking medical care (R. p. 109-110). The defendants may still make themselves heard by using ordinary speech to individuals entering and leaving the clinic. They are only barred from using bullhorns land loudspeakers and excessively loud shouting. Thus the noise restriction burdens no more speech than necessary to protect the health and well being of patients seeking medical care.

Thus, all the elements set forth in Madsen are present in this case. The existing injunction (or even a more restrictive injunction) based on the framework of Judge Pleicones' injunction is content neutral, seems a significant governmental interest, and burdens no more free speech than is necessary. Madsen and Schenck v. Pro-Choice Network were the guideposts for the trial Court and to claim South Carolina ignored these cases borders on ludicrous.

Likewise, there is no conflict with this Court's decision in NAACP v. Clairborne Hardware, Co., 458 U.S. 886 (1982). In Clairborne, several organizations and persons organized a massive boycott of white-owned businesses in an effort to obtain concessions regarding racial equality. The boycott did involve some threats, violence and coercion to influence other black citizens not to break the boycott. The trial court found that their conduct was not protected under the First Amendment and found a host of entities liable for malicious interference with business relations and found violations of two Mississippi statutes and enjoined further boycott activity. The Mississippi Supreme Court affirmed the finding of malicious interference and the injunction but found the state statutory provisions were inapplicable. This Court found that the injunction against further boycott

activity violated the first amendment. The case *sub judice* is markedly different. Petitioners right to protest is recognized as protected under the First Amendment and the South Carolina Courts crafted their injunction to still allow this protected speech. However, the Petitioners seem to think that the First Amendment gives them a free pass to do anything—such as put patrons of the clinic in danger by blocking their view of traffic and creating a danger that Petitioners even recognize. Also, the South Carolina Courts found that Petitioners evinced a specific goal to put Respondent specifically out of business—unlike the Mississippi boycott which was directed at all white businesses for specific political reasons.

Petitioners also assert that the Supreme Court of South Carolina, in affirming the narrowly drawn injunction, violated principles set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Because they did not win, Petitioners seem to think that the Courts of South Carolina did not really listen or scrutinize the facts. The content of the Injunctive Orders clearly refutes this unfounded allegation. Petitioners further claim that South Carolina Courts violated Thompson v. City of Louisville , 362 U.S. 199, 206 (1960), which dealt with a man convicted of loitering when no evidence supported this finding. Here, the record is replete with evidence that the Petitioners targeted Palmetto State Clinic to close down and created danger to patrons by blocking ingress and egress from a very busy Greenville Street.

The South Carolina Courts, in narrowly crafting the injunctive relief sought, were mindful of the requirements set down by this Court and adhered to them. Petitioners simply do not like the result—so they allege that the South Carolina Courts of bizarre things, such as dismantling the First Amendment or not listening to the evidence.

Any subsequent change in South Carolina statutory law which may effect this case should properly be brought before the Circuit Court of South Carolina

Petitioners also claim that the "South Carolina Religious Freedom Act" (SCRFA), passed after the litigation in this case, effects or nullifies the injunction. It is Respondent's position that this Act in no way effects the judgment in that the injunction complies with the SCRFA. However, any challenge Petitioners want to make based on this new law should properly be done in the South Carolina Circuit Court for a Declaratory Judgment.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's petition for a writ of certiorari.

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